DEBT VALIDATION –

MYTH, MYSTERY OR MIND TRAP

A presentation of Senior Outreach Ministries

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The estimates of the amount of debt carried by Americans ranges from about $2000 per adult to $8000 per adult and this is just on their credit cards. When you add in house, car, boat, motorcycle and RV payments on top of everyday household expenses like groceries, insurance, vacations, appliance and environmental home system repairs along with a myriad of other obligations, you can see why debt is more than a 4 letter word.

This ebook does not purport to be a get out of debt plan, a credit repair plan, tell your creditor to shove it plan or any other scheme in those channels. Rather, it is an ebook that covers only one topic: Debt Validation and it covers it the way I see debt validation as it exists today. In other words, since I believe I've done my homework, I'm sharing my opinion of what I think I learned.

Debt Validation comes into existence only at the time a person receives a letter from a debt collector stating something to the effect they are attempting to collect a debt for XYZ, Co. in the amount of $BBBBB.CC. They tell you in the letter unless you dispute this thing they are saying is a debt within 30 days, it will be presumed you owe it.

There are two ways to react to this letter. One, answer it. Two, ignore it. Number two is not a good idea for a myriad of reasons the least of which is you actually may not owe the debt.

You see, debt collectors have been criminally prosecuted for telling someone they owe a debt when in fact the person did not owe the debt. You can google a ton of stories about such happenings so I won't say anymore here.

You also may not owe as much as they claim. Another debt collector trick which has cost them quite a few dollars after the court suit was settled in the alleged debtor's favor. When you google for the above information, I feel certain you'll read about this fax paus as well.

To understand the composition of the letter from the collector you should understand the law behind it. The law that sets the parameters is the Fair Debt Collection Practices Act (FDCPA). It states, for example, the collector must tell the alleged debtor that they are attempting to collect a debt.

Sidebar: I once had a debt collector state in their letter they were just writing a letter for a friend who happened to be a client and they didn't include the required wording about attempting to collect a debt. I never heard from them again after I wrote and highlighted the violations of the FDCPA they had committed. Oh that all such collectors could be disposed of so easily.

Please become familiar with the FDCPA as it could become your newest best friend.

Section 1692g of the FDCPA is the paragraph addressing debt validation. It is titled: Validation of Debt. This is important because validation and verification are not the same

thing in the eyes of the law. The law is codified in Title 15 of the United States Codes beginning in section 1692. Use any search engine to find this Title.

Verification, although used in the Code, is not as requiring as validation. If you care to research this point, start with a good law dictionary then move into the court cases. Unless you want to fall asleep, I'd wait until I was contacted by an over aggressive debt collector.

Here is the applicable section as printed in the Codes:

Sec. 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with ***a*** consumer in connection with the collection of any debt, ***a*** debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer ***a*** written notice containing -

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) ***a*** statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) ***a*** statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or ***a*** copy of ***a*** judgment against the consumer and ***a*** copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) ***a*** statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if

different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (***a***) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or ***a*** copy of ***a*** judgment, or the name and address of the original creditor, and ***a*** copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) Admission of liability

The failure of ***a*** consumer to dispute the validity of ***a*** debt under this section may not be construed by any court as an admission of liability by the consumer.

Notice the thirty day requirement in the Code? They must give you 30 days to request a validation. Also, look at subsection (c) right above this paragraph.

Should you fail to dispute the validity of a debt, no court is allowed to construe your failure as an admission of liability. This is a very powerful subsection because you no longer are liable simply because you did not dispute the validity of the debt at the onset.

You may not have done so for any number of reasons. You, in fact, may have wanted your day in court without the encumbrance of a stack of paperwork or you may wanted to short circuit the time the dispute would normally take if you entered into a letter writing campaign.

All of that is now moot per the law. That’s a good thing.

Now the question is reduced to what is this animal called validation you want from the debt collector? No part of this section clearly defines validation yet it lays the requirement for such an action squarely on the shoulders of the debt collector.

Debt collectors will take the verification route and use computer print outs or copies of paper work you allegedly signed years ago or copies of microfiche documents or a letter supposedly from somebody in the credit department of the original creditor. If the debt has been reassigned or sold several times, the new debt collector uses the collection letter the former collector sent you.

As you can imagine, most consumers do not accept this slight of hand as validation. They want their original contract or the other document(s) alleging a debt be brought forward that has their signature on it.

On this point, unfortunately, the courts seem to be ruling that a computer print out from the creditor alleging a debt is sufficient as validation. And, unfortunately one more time, the Federal Rules of Evidence (FRE), sections 1002, 1003 and 1004 are allowing the courts to rule this way.

Here are the rules, along with their Notes, as they appear in the FRE.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Notes on Rule 1002: Notes of Advisory Committee on Rules.

The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 1001(1) and (2), supra.

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick § 198; 4 Wigmore § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party wishes to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to

prove the contents of the picture, and the rule is inapplicable. Paradis, The Celluloid Witness, 37 U.Colo.L. Rev. 235, 249-251 (1965).

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber. See People v. Doggett, 83 Cal.App.2d 405, 188 P.2d 792 (1948) photograph of defendants engaged in indecent act; Mouser and Philbin, Photographic Evidence-Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original. Daniels v. Iowa City, 191 Iowa 811, 183 N.W. 415 (1921); Cellamare v. Third Acc. Transit Corp., 273 App.Div. 260, 77 N.Y.S.2d 91 (1948); Patrick & Tilman v. Matkin, 154 Okl. 232, 7 P.2d 414 (1932); Mendoza v. Rivera, 78 P.R.R. 569 (1955).

It should be noted, however, that Rule 703, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Notes on Rule 1003: Notes of Advisory Committee on Rules.

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), supra, a "duplicate" possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. This position finds support in the decisions, Myrick v. United States, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; Johns v. United States, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; Sauget v. Johnston, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy. Other reasons for requiring the original may be

present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. United States v. Alexander, 326 F.2d 736 (4th Cir. 1964). And see Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959).

Notes of Committee on the Judiciary, House Report No. 93-650.

The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original."

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) **Originals lost or destroyed**. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original not obtainable**. No original can be obtained by any available judicial process or procedure; or

(3) **Original in possession of opponent**. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) **Collateral matters**. The writing, recording, or photograph is not closely related to a controlling issue.

Notes on Rule 1004: **Notes of Advisory Committee on Rules.**

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactory explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence

possible and the arguments and procedures available to his opponent if he does not. Compare McCormick § 207.

Paragraph (1). Loss or destruction of the original unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. McCormick § 201.

Paragraph (2). When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick § 202.

Paragraph (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203.

Paragraph (4). While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, Foster-Holcomb Investment Co. v. Little Rock Publishing Co., 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick § 200, p. 412, n. 1.

Notes of Committee on the Judiciary, House Report No. 93-650.

The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

You can find this information simply by going to your nearest law library and opening a copy of the Federal Rules of Evidence to Rule 1002. By the way, some people say the above rules are located in the Federal Rules of Civil Procedure. This is simply not so as the FRCP are numbered 1 through 86 and never even touch numbering into 100 and above let alone 1000 and above.

Regardless, now that you know where to find the applicable rules and have their accompanying notes, you are better armed to phrase your argument. The notes are

extremely important because they add clarification to the rule itself. Always look for notes or annotations to any statute or code section you are researching. They not only clarify but lay out, in some cases, the thought processes of the law makers.

You have a right to demand the original as you can plainly read. However, for one reason or another, the debt collector can weasel out of producing the original. I believe the weasel clauses were allowed in the rules because of income taxes.

The IRS puts all kinds of entries into your Master File but never produces the original document authorizing them to make any of the entries. Having been down that road with this bunch of brigands, I can state flatly the court is never on the taxpayer's side. It always allows the IRS to use a dummied up, at least in my case, computer printout as validation/verification of taxes owed.

This ebook is also not about the IRS but I reserve the right to inject my opinion about the genesis of why the original doesn't have to be produced. I have researched many college treatises as well as having read many books in this area and I can only come to the conclusion that the leeway allowed the IRS has spilled over into the credit arena. For me, this is a truly sad day.

Others have adeptly written about certain cases decided in the validation argument and have said the courts either didn't address the issue of the original or agreed with the debt collector that verification/validation is completed with the presentation of a computer print out or a copy of a supposed contract.

It is immaterial what the courts said or didn't say because the governing doctrine is laid out in the already quoted sections of the Federal Rules of Evidence. Believe me, all states have adopted the FRE in one manner or another.

Why? Because it is a well laid out schematic easily adaptable to local rules and customs. Its ease of construction is hard to argue with.

Therefore, at least in my opinion, you stand a better chance of beating the debt collector by scrutinizing their legal responsibility to follow the procedures. For example, lawyers can be debt collectors and you would think they'd be the first to follow the procedures to a T, right?

Wrong!

Not only do they have to follow federal procedures, they must comply with state procedures. If you live in Nevada like I do and a debt collecting lawyer sends you one of those "I am attempting to collect a debt letter" and she is not licensed to practice law in the State of Nevada, she may have to be licensed as a collection agency. Also, the form letter she mailed you must have been approved by the State. If neither of these requirements are met, you win on procedures. That's a good thing.

A debt collector may not have reported you to any credit bureau prior to resolution of your dispute. This is a common occurrence causing untold grief for alleged debtors.

OK, at the beginning of this ebook I did say this book's focus is strictly validation and I've gone astray. Not much, but enough to have to stop myself.

I have a Request For Validation letter I send to all debt collectors in which I ask certain questions. These questions set the stage for a law suit should the process go that far. I do not give this letter away as it has material I haven't seen anywhere else.

I am not saying it is bullet proof simply because I don't know how a judge will rule in any presented set of circumstances. But, I do know, this letter does a beautiful job of protecting my interests and intertwining the FRE and local statutes into the matter.

It also allows me to sue in the easiest and least expensive court in any state – Small Claims Court. The highest amount I could sue for in Nevada is $5000.00. However, if I believe I have more than $5000.00 in damages, I will file suit in Federal District Court.

I think my letter pinpoints the sections in both the Federal and State Statutes the debt collector will have violated. Therefore, I believe I will win on the procedures, that is, violations thereof. Procedures they, and not me, must follow since the law specifically lays the procedural requirement smack on their door step.

There you have it. My take on Debt Validation and an alternative way to at least counter sue the debt collector.

I can be reached at tom@senior2senior.org with questions, comments or critiques.